RECORD AND BRIEFS

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In The
Supreme Court of the United States

SHANNON NELSON AND LOUIS ALONZO MADDEN,

Petitioners,

v.

COLORADO,

Respondent.

On Writ Of Certiorari To
The Colorado Supreme Court

BRIEF OF *AMICI CURIAE* INSTITUTE FOR JUSTICE AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Institute for Justice ("IJ") is a nonprofit, public interest law firm committed to defending the essential foundations of a free society by securing greater protection for individual liberty and restoring constitutional limits on the power of government. A central pillar of IJ's mission is protection for the right to own and enjoy property, both because property rights are a tenet of personal liberty and because property rights are inextricably linked to all other civil rights. IJ litigates cases to defend property rights and also files *amicus curiae* briefs in important property rights cases. *See, e.g.*, *Horne v. Dep't of Agric.*, 135 S. Ct. 2419 (2015); *Kaley v. United States*, 134 S. Ct. 1090 (2014); *Koontz v. St. John's River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Sackett v. Envtl. Prot. Agency*, 132 S. Ct. 1367 (2012); *Bennis v. Michigan*, 516 U.S. 442 (1996).

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts

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[1] All parties have consented to the filing of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

conferences, and produces the annual *Cato Supreme Court Review*.

Both IJ and Cato are deeply troubled by the suggestion – implicit in Colorado's challenged legal scheme – that the right to property can be made contingent on affirmative proof of innocence. The right to property is not limited to individuals who can undertake the daunting and expensive task of marshalling proof of innocence; ***all*** Americans enjoy the right to be secure in their property, at least until the government obtains a valid criminal conviction in a court of law. A contrary rule would render the right to property effectively meaningless for some of the most vulnerable members of society, and it would potentially subject all Americans to an unjust and unconstitutional obligation to prove their innocence. The right to property is not so limited.

SUMMARY OF ARGUMENT

The presumption of innocence has been repeatedly recognized and reaffirmed by this Court as a deeply-held and foundational principle underlying our justice system, long predating the adoption of the Constitution and firmly embedded within the "due process of law" protected by the Fifth and Fourteenth Amendments. This Court has recognized that the presumption of innocence "is stated as unquestioned in textbooks, and has been referred to as a matter of course in the decisions of this court and in the courts

of the several states."[2] Simply put, "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."[3]

This principle – that all individuals are presumed innocent until validly convicted in a court of law – is "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [it was] sacrificed."[4] The origins of the presumption go well beyond our own Anglo-American legal system, stretching back to Roman antiquity and beyond to the Old Testament. *Infra* pp. 6-7. The presumption was central to the English common law, including the writings of Sir William Blackstone. *Infra* p. 8. And disregard for the presumption of innocence was one of the motivating factors behind the Declaration of Independence at the time of this nation's birth. *Infra* pp. 9-10. Moreover, the presumption of innocence has never been limited to criminal cases but extends through all the law. *Infra* pp. 11-14. Unsurprisingly, given that pedigree, the presumption of innocence has been repeatedly reaffirmed by this Court. *Infra* pp. 15-17.

Applying the presumption of innocence, this should be an easy case. All individuals have the right to be secure in their property unless and until the government obtains a valid conviction in a court of law.

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[2] *Coffin v. United States*, 156 U.S. 432, 454 (1895).

[3] *McFarland v. Am. Sugar Ref. Co.*, 241 U.S. 79, 86 (1916) (Holmes, J.), *cited with approval by Patterson v. New York*, 432 U.S. 197, 209 (1977).

[4] *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325-26 (1937)).

Here, however, Colorado has flipped that presumption on its head, instead requiring property owners who are not subject to any legally-valid conviction to come forward with "clear and convincing evidence" that they are "actually innocent" of a crime.[5] By thus "flip[ping] the presumption of innocence,"[6] Colorado's scheme for seeking a refund of criminal penalties contravenes principles that lie at the core of our justice system and violates the guarantee of due process secured by the Fifth and Fourteenth Amendments.

ARGUMENT

This brief proceeds in two parts. First, the brief traces the pedigree of the presumption of innocence, establishing that the presumption is deeply rooted in our nation's history and tradition. Second, the brief applies this foundational principle to the instant case, explaining that Colorado's scheme for obtaining a refund of criminal penalties is inconsistent with the basic precept that all persons are presumed innocent unless and until they are subject to a valid judgment of conviction. So framed, this is a simple case. Colorado's scheme is inconsistent with the most basic requirements of due process.

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[5] Colo. Rev. Stat. §§ 13-65-101(1)(a),13-65-102(1)(a).

[6] *People v. Nelson*, 362 P.3d 1070, 1081 (Colo. 2015) (Hood, J., dissenting).

I. The Presumption of Innocence Is Deeply Rooted in Our Nation's History and Tradition, Such That It Is Implicit in the Concept of Ordered Liberty.

The presumption of innocence is such a foundational principle – so suffusing every aspect of our legal system – that it is perhaps at risk of being taken for granted. This brief thus begins by tracing the origins of that principle, its extension beyond the requirement that criminal charges be proved beyond a reasonable doubt, and its repeated application by the decisions of this Court.

A. The Presumption of Innocence Has Deep Historical Roots.

The presumption of innocence has been called "a general principle of our political morality,"[7] "a guardian angel,"[8] the "cornerstone of Anglo-Saxon justice,"[9] "a touchstone of American criminal jurisprudence,"[10] "the golden thread that runs throughout the criminal

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[7] William S. Laufer, *The Rhetoric of Innocence*, 70 Wash. L. Rev. 329, 338 (1995) (quoting William Twining, *Rethinking Evidence: Exploratory Essays* 208 (1990)).

[8] Laufer, *supra*, at 338 (quoting James Bradley Thayer, *A Preliminary Treatise on Evidence at the Common Law* 553 (1898)).

[9] Laufer, *supra*, at 338 (quoting Henry J. Abraham, *The Judicial Process* 96 (1993)).

[10] Laufer, *supra*, at 338 (quoting *People v. Layhew*, 548 N.E.2d 25, 27 (Ill. App. Ct. 1989)).

law,"[11] and the "focal point of any concept of due process."[12] This basic principle traces its roots far past our nation's Founding, through English common law to writings from antiquity and even the Old Testament.

Several writers have observed the Biblical foundations of the presumption of innocence.[13] In the Book of Genesis, after Adam and Eve ate the forbidden fruit, God did not summarily punish them but instead summoned them to hear their pleas:

> "Have you eaten of the tree of which I commanded you not to eat?" The man said, "The woman, whom you gave to be with me, she gave me fruit of the tree, and I ate." Then the LORD God said to the woman, "What is this that you have done?" The woman said, "The serpent deceived me, and I ate."[14]

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[11] Scott E. Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 Hastings L. J. 457, 457 (1988-1989) (citations omitted) (quoting Rupert Cross, *The Golden Thread of the English Criminal Law: The Burden of Proof* 2 (1976)).

[12] Sundby, *supra*, at 457 (quoting Sandra Hertzberg & Carmela Zammuto, *The Protection of Human Rights in the Criminal Process Under International Instruments and National Constitutions* 16 (1981)).

[13] *See Coffin v. United States*, 156 U.S. 432, 454 (1895) (citing Simon Greenleaf, III, *A Treatise on the Law of Evidence* § 29, at 31 n.1 (Edmund H. Bennett & Chauncey Smith, eds., 1853) (tracing the presumption to Deuteronomy); *see also* Alexander Volokh, *N. Guilty Men*, 146 U. Pa. L. Rev. 173, 173, 178 (1997) (identifying biblical passages loosely related to the presumption of innocence).

[14] *Genesis* 3:11-13.

Thus, even an omniscient God did not presume Adam and Eve to be guilty, but only inflicted punishment after obtaining proof through confessions (and presumably rejecting Adam's defense of entrapment and Eve's defense of fraud). The presumption of innocence found even more concrete expression in the Book of Deuteronomy, which states that "[o]ne witness is not enough to convict anyone accused of any crime" and instructs judges to "make a thorough investigation" before inflicting punishment.[15]

The presumption of innocence can definitively be traced back to antiquity and the ancient Roman maxim, *de quolibet homine presumitur quod sit bonus homo donec probetur in contrarium*, meaning, "each person may be presumed to be a good man, until the contrary is proved."[16] A related maxim embodying the presumption of innocence stated, *ei incumbit probatio, qui dicit, non qui negat*, meaning "the burden of proving a fact rests on the party who asserts it, not on the party who denies it."[17] The Emperor Trajan, meanwhile, wrote that a person should not "be condemned on suspicion; for it was preferable that the crime of a guilty man should go unpunished than an innocent man be condemned."[18]

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[15] *Deuteronomy* 19:15-20; *see also Numbers* 35:30.

[16] James Bradley Thayer, *The Presumption of Innocence in Criminal Cases*, 6 Yale L. J. 185, 190 (1897).

[17] Laufer, *supra*, at 332 n.14 (citing George P. Fletcher, *Rethinking Criminal Law* 520 (1978)).

[18] Volokh, *supra*, at 178 (quoting Dig. 48.19.5 (Ulpian, De Officio Proconsulis 7)).

The presumption of innocence was once again picked up in the writings of Enlightenment philosophers. Voltaire, for instance, wrote of "that generous Maxim, 'that "tis much more Prudence to acquit two Persons, tho" actually guilty, than to pass Sentence of Condemnation on one that is virtuous and innocent.'"[19]

From there, the presumption of innocence took firm root in English common law.[20] Echoing Voltaire, as well as Emperor Trajan, Sir William Blackstone declared that "the law holds, that it is better that ten guilty persons escape than that one person suffer."[21] Blackstone's Commentaries on the Laws of England "not only provided a definitive summary of the common law but was also a primary legal authority for 18th- and 19th-century American lawyers."[22] Influenced by both Voltaire and Blackstone, Benjamin Franklin, "our founding grandfather,"[23] wrote, "That it is better 100 guilty Persons should escape than that

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[19] *See* Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 Tenn. L. Rev. 759, 761 n.6 (1995) (quoting *Respectfully Quoted* 183 (Suzy Platt ed., 1992) (quotation from a 1974 translation of the 1749 version of Zadig)).

[20] In-depth treatments of these developments can be found in Anthony A. Morano, *A Reexamination of the Development of the Reasonable Doubt Rule*, 55 B.U. L. Rev. 507 (1975); Laufer, *supra*; Thayer, *supra*; and Jeff Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 Wis. L. Rev. 441 (1978).

[21] 4 William Blackstone, *Commentaries*, *358 (1765).

[22] *Washington v. Glucksberg*, 521 U.S. 702, 712 (1997).

[23] *See* Dudley R. Herschbach, *Our Founding Grandfather*, Harv. Mag., Sept. 2003.

one innocent Person should suffer, is a Maxim that has been long and generally approved."[24]

In fact, one of the motivations leading up to the Declaration of Independence from Great Britain was the Crown's disregard for this principle of innocent until proven guilty.[25] The American colonists had many objections to the infamous Sugar Act of 1764 and its companion, the Stamp Act of 1765. In addition to the core complaint of taxation without representation,[26] the colonists strongly objected to the enforcement provisions of the two statutes. Whereas in England actions asserting violations of similar laws were tried before a jury, cases alleging violations of the Sugar and Stamp Acts were to be tried in newly-created American vice-admiralty courts where there were no jury trials.[27]

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[24] Letter from Benjamin Franklin to Benjamin Vaughan (March 14, 1785) *in* 9 *The Writings of Benjamin Franklin, 1783-1788*, at 293 (Albert H. Smyth ed., 1906).

[25] *See* Declarations and Resolves of the First Continental Congress (Oct. 14, 1774), *available at* http://avalon.law.yale.edu/18th_century/resolves.asp.

[26] *See* Samuel Adams, Report on the Sugar Act (May 1764), *in* Theodore Draper, *A Struggle for Power: The American Revolution* 219 (1996) ("If Taxes are laid upon us in any shape without our having a legal Representation where they are laid, are we not reduced from the Character of free Subjects to the miserable State of tributary Slaves?").

[27] *See* Matthew P. Harrington, *The Legacy of the Colonial Vice-Admiralty Courts (Part B)*, 27 J. Mar. L. & Comm. 323, 332 (1996) (noting this was "a constant source of irritation to the American colonists"). For example, John Adams argued that the use of the vice-admiralty courts to try trade cases placed an unfair burden on Americans:

"The most onerous provisions"[28] of the Acts required merchants whose vessels were seized for alleged customs violations to bear the burden of proving that they were not guilty.[29] Thus, one grievance leading to the American Revolution was the Crown's disregard for the presumption of innocence – a feature shared with Colorado's scheme here.

> The Parliament . . . guarding the People of the Realm, and securing to them the Benefit of a Tryal by the Law of the Land, and . . . depriving all Americans of that Privilege – What shall we say to this Distinction? Is there not in this.., a Brand of Infamy, of Degradation and Disgrace fixed upon every American? Is he not degraded below the Rank of an Englishman?'

Id. at 336 (quoting John Adams, Admiralty Notebook, in microfilms of the Papers of John Adams, pt. III, reel 184).

[28] Harrington, *supra*, at 333.

[29] For example, Article XLV of the Sugar Act provided:

> [I]f any ship or goods shall be seized . . . and any dispute shall arise whether the customs and duties for such goods have been paid . . . then, and in such cases, ***the proof thereof shall lie upon the owner or claimer of such ship or goods, and not upon the officer who shall seize or stop the same***; any law, custom, or usage, to the contrary notwithstanding.

The Sugar Act (Apr. 5, 1764) *in Prologue to the Revolution: Sources and Documents on the Stamp Act Crisis 1764-1766*, at 8 (Edmund S. Morgan ed., 2012).

B. The Presumption of Innocence Is Integral to the Concept of Justice and Due Process of Law.

The presumption of innocence extends well beyond the requirement that the government must prove guilt beyond a reasonable doubt in a criminal trial and is, in fact, an axiomatic principle that defines the concept of justice and due process throughout our entire legal system. "[N]either liberty nor justice would exist if [it was] sacrified."[30]

The presumption of innocence is more than a simple evidentiary presumption, and instead reflects a long-standing societal judgment about the degree of legal process that is required to strip an individual of liberty and property. The presumption is a "shorthand description of the right of the accused to remain inactive and secure, until the prosecution has taken up its burden."[31] It "takes possession of this fact, innocence, as not now needing evidence, as already established *prima facie*."[32] In other words, the presumption does

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[30] *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

[31] *Taylor v. Kentucky*, 436 U.S., 478, 483 n.12 (1978); *see also id.* (explaining that "the so-called 'presumption' is not evidence – not even an inference drawn from a fact in evidence – but instead is a way of describing the prosecution's duty"); *Commonwealth v. Webster*, 59 Mass. 295 (1850), *abrogated on other grounds by Commonwealth v. Russell*, 470 Mass. 464 (2015) ("All the presumptions of law ***independent of evidence*** are in favor of innocence, and every person is presumed to be innocent until he is proved guilty.") (emphasis added).

[32] Thayer, *supra*, at 199; *see also id.* (explaining that the presumption of innocence means that, even if a person is "under

not depend on a judgment that an individual is ***in fact*** more likely innocent than guilty; indeed, as a factual matter, it might be more reasonable to assume that anyone who has been arrested and indicted is more likely guilty than not.[33] Instead, the presumption stands for the basic proposition that a person can be deprived of rights to liberty or property only following a valid conviction by a court of law.

Respect for this presumption of innocence is foundational to the very concept of justice. The presumption emerged in the English common law as part of a profound transformation in the nature and function of legal proceedings, and it can be contrasted to other, medieval approaches to the administration of justice:

> An accused did not have to demonstrate innocence by hands unscarred from hot coals, irons, or stones. An accused did not have to bring together twelve peers in a wager of law to swear that his or her oath of innocence was clean and trustworthy. God could no longer

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grave suspicion," "he is not to suffer in your minds from these suspicions or this necessity of holding him confined and trying him").

[33] *See* Zechariah Chafee, *The Progress of the Law*, 35 Harv. L. Rev. 302, 314 (1922) ("There is no probability that a man indicted by a grand jury is usually innocent"); Thayer, *supra*, at 199 ("[I]f the jury were not thus called off from the field of natural inference, if they were allowed to range there wherever mere reason and human experience would carry them, the whole purpose of the presumption of innocence would be balked. For of the men who are actually brought up for trial, probably the large majority are guilty."); *id.* at 188 (the presumption in favor of the defendant is a "maxim of policy and practical sense; it is not founded on any notion the defendants generally are [factually] free from blame.").

> reveal the innocent from the murderer, thief, and robber. ***Proof of factual innocence was replaced by proof of legal guilt or its absence, legal innocence***. Legal standards and burdens of proof acknowledged what ancient fact finders and jurists could not: Definitive proof of factual innocence was too much of a burden for mortals to bear.[34]

In other words, the presumption of innocence is intrinsic to the very idea of a rational and orderly justice system. The presumption marks the divide between a world where individuals can be subjected to arbitrary and irrational deprivations of their liberty and property – forced to win back their rights through an affirmative showing of innocence – and a world where rights can be infringed only following a valid legal judgment of guilt.

This "general rule of policy and sense" – that all persons shall be assumed, in the absence of evidence, to be free from blame – runs "through all the law."[35] It often has been stated in the context of criminal proceedings,[36] but it is by no means limited to that

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[34] Laufer, *supra*, at 331-32 (emphasis added).

[35] Thayer, *supra*, at 189.

[36] *See* Thayer, at 196; George P. Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 Yale L. J. 880 (1967-1968) (arguing that the presumption of innocence and the requirement of proof "beyond a reasonable doubt" are historically and philosophically distinct).

context.[37] To the contrary, its first appearance in the American colonial courts, an early (1657) decision of the General Court of Massachusetts, emphasized its broader applicability:

> Whereas, ***in all civil cases*** depending in suit, the plaintiff affirmeth that the defendant hath done him wrong and accordingly presents his case for judgment and satisfaction, it behoveth both court and jury to see that the affirmation be proved by sufficient evidence, else the case must be found for the defendant; and ***so it is also in a criminal case***, for in the eyes of the law every man is honest and innocent unless it be proved legally to the contrary.[38]

In other words, the presumption of innocence applies broadly beyond criminal cases and is integral to due process of law.

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[37] *See, e.g., Speiser v. Randall*, 357 U.S. 513, 526 (1958) (holding, in civil tax-enforcement proceeding, that "[d]ue process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt").

[38] Thayer, *supra*, at 189 (quoting 16 Records of Massachusetts, III., 434). *See generally* P. Thomas, *Revolution in America: Britain and the Colonies, 1763-1776* at 67 (1992); David S. Lovejoy, *Rights Imply Equality: The Case Against Admiralty Jurisdiction in America, 1764-1776*, 16 Wm. & Mary Q. 459 (1959); C. Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* 126-42, 154-58 (1960).

C. This Court Has Consistently Recognized That the Presumption of Innocence Is Constitutionally Required.

Unsurprisingly, in light of the pedigree and importance of the presumption of innocence, this Court has long recognized the presumption of innocence as a touchstone of the American justice system. As early as 1827, the Court acknowledged that "the general rule of our jurisprudence is, that the party accused need not establish his innocence, but it is for the government itself to prove his guilt, before it is entitled to a verdict of conviction."[39]

In *Coffin v. United States*, the Court explicitly recognized the presumption of innocence as a fundamental

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[39] *U.S. v. Gooding*, 12 Wheat. 460, 471 (1827) (Story, J.). Other decisions suggest that the presumption of innocence has always been part of the American justice system. *See, e.g., Hopt v. Utah*, 120 U.S. 430, 439 (1887) (approving jury instruction adopted by lower court stating that "the law presumes the defendant innocent until proven guilty beyond a reasonable doubt"); *Lilienthal's Tobacco v. United States*, 97 U.S. 237, 266 (1877) ("[I]n criminal trials the party accused is entitled to the legal presumption in favor of innocence, which, in doubtful cases, is always sufficient to turn the scale in his favor."); *see also Leland v. Oregon*, 343 U.S. 790, 802-03 (1952) ("[F]rom the time that the law which we have inherited has emerged from dark and barbaric times, the conception of justice which has dominated our criminal law has refused to put an accused at the hazard of punishment if he fails to remove every reasonable doubt of his innocence"; rather, it is "the duty of the Government to establish his guilt," a notion "basic in our law and rightly one of the boasts of a free society [and] a requirement and a safeguard of due process of law") (Frankfurter, J., dissenting), *cited with approval by In re Winship*, 397 U.S. 358, 362 (1970).

principle of criminal law. The question presented was whether the trial court had violated a defendant's rights by not instructing the jury on the presumption of innocence. Before embarking on a detailed historical analysis of its origins, the Court characterized the presumption of innocence as "axiomatic and elementary," affirming that "its enforcement lies at the foundation of the administration of our criminal law."[40]

Since then, the Court has repeatedly held that the presumption of innocence is constitutionally required. For example, in *In re Winship*, the Court held that juveniles, like adults, were entitled to proof beyond a reasonable doubt when charged with a violation of criminal law.[41] The Court reiterated that the presumption of innocence, as a "bedrock" principle, was constitutionally required.[42] In *Estelle v. Williams*, the Court declared that, "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice."[43] And in *Taylor v. Kentucky*, the Court concluded that the presumption of innocence "is an

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[40] 156 U.S. 432, 453 (1895).

[41] 397 U.S. 358 (1970).

[42] 397 U.S. 358, 363 (1970) (observing that the reasonable-doubt standard "provides concrete substance for the presumption of innocence").

[43] 425 U.S. 501, 503 (1976) (Burger, C.J.).

element of Fourteenth Amendment due process, an essential of a civilized system of criminal procedure."[44]

The Court has also adhered to this same principle in analyzing the constitutionality of legislation. In *Tot v. United States*, the Court rejected the idea that "the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt."[45] And in *McFarland v. American Sugar Refining Co.*, the Court stated that "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."[46]

II. By Flipping the Presumption of Innocence, Colorado Has Denied Petitioners Due Process.

This case can and should be resolved through a straightforward application of the presumption of innocence. Although neither Petitioner stands convicted of a crime, each has been forced to pay criminal penalties. In order to seek return of this money, Colorado requires that they prove their innocence, effectively turning the presumption of innocence on its head. By flipping the burden to prove innocence, Colorado has violated Petitioners' due-process rights.

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[44] 436 U.S. 478, 486 n.13 (1978).

[45] 319 U.S. 463, 469 (1943).

[46] 241 U.S. 79, 86 (1916) (Holmes, J.), *cited with approval by Patterson v. New York*, 432 U.S. 197, 209 (1977).

It is undisputed that, while Petitioners were charged with crimes, they were never validly convicted.[47] They should, therefore, stand before the tribunal as all citizens of Colorado would stand: innocent in the eyes of the law, as *prima facie* "good, honest, and free from blame."[48] Instead, Colorado forces them to prove that they are "actually innocent."[49] Colorado's burden shifting amounts to an assumption that individuals, whose convictions have been overturned and thus no longer have any legal effect, are *prima facie* guilty of the crimes with which they were charged. And to add insult to this constitutional injury, they have to prove that they are actually innocent of the charge "by clear and convincing evidence."[50]

Colorado cannot escape this conclusion by attempting to shoehorn these proceedings into the framework of the State's Exoneration Act, an Act which does not even apply.[51] The Exoneration Act requires proof of actual innocence to obtain compensation for wrongful incarceration.[52] Here, by contrast, Petitioners seek return of property that was taken by the government pursuant to a now-invalid criminal conviction. In other words, Petitioners only ask for the return of what is theirs. Because Petitioners have not been validly convicted, the government has no legal

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[47] *See* Pet'r's Br. 13-14.

[48] Thayer, *supra*, at 189.

[49] Colo. Rev. Stat. §§ 13-65-101(1)(a), 13-65-102(1)(a).

[50] *Id.* § 13-65-101(1)(a).

[51] *See* Pet'r's Br. 4-8.

[52] *See* Colo. Rev. Stat. §§ 13-65-101(1)(a), 13-65-102(1)(a).

basis to continue to hold that property – much less to force Petitioners to affirmatively prove their own innocence to get that property back.

In our legal system, individuals cannot be deprived of property based on accusations, without putting the government to its proof. That basic principle – the presumption of innocence – runs throughout the legal system and is central to the very idea of ordered liberty. By instead placing the burden on Petitioners to affirmatively prove their innocence in order to vindicate their property rights, Colorado has inverted the basic structure of our legal system and turned this foundational precept on its head.

CONCLUSION

For the reasons set forth above, *amici* urge the Court to hold that Colorado has violated due process by requiring Petitioners to prove their innocence and thus to reverse the decision of the Colorado Supreme Court.

Respectfully submitted,

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